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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 712

MARTIN MALINOU,
PUBLIC ADMINISTRATOR,
Petitioner,

v.

GORDON CAIRNS,
RHODE ISLAND HOSPITAL TRUST
COMPANY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Rhode Island rendered on July 12, 1967, in case number A-106, styled *Martin Malinou, Public Administrator v. Gordon Cairns, Rhode Island Hospital Trust Company, et al.*, wherein the Rhode Island Supreme Court affirmed the judgment of the Rhode Island Superior Court and denied and dismissed the Petitioner's appeal.

OPINIONS BELOW

The opinion of the Rhode Island Supreme Court (R. 18) is not yet officially reported; it is unofficially reported in 231 A.2d 785; and it is printed in Appendix A hereto. The memorandum opinion of the Rhode Island Supreme Court (R. 3), denying the Petitioner's motion for reargument is not yet officially reported; it is unofficially reported in 231 A.2d 785, 788. The memorandum opinion of the Rhode Island Supreme Court (R. 2), granting the Petitioner's motion for a stay of the execution of the judgment sought to be reviewed, is not reported. The opinion of the Rhode Island Superior Court (R. 223, pp. 205-207) is not reported; it is printed in Appendix B hereto. The Probate Court of the City of Providence did not deliver an opinion.

JURISDICTION

The Rhode Island Supreme Court judgment sought to be reviewed (R. 18, 23; Appx. A-5) was rendered on July 12, 1967 (R. 24). The Petitioner's timely motion for leave to file a petition for reargument (R. 8) was denied on August 1, 1967 (R. 3). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) since the Petitioner specially claims a substantive right of property under the Fourteenth Amendment of the Constitution of the United States and also specially claims a right to procedural due process under the Fourteenth Amendment of the Constitution of the United States. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) since the Petitioner, on behalf of the people of the City of Providence, Rhode Island, specially claims a right to procedural due process under the Fourteenth Amendment of the Constitution of the United States.

QUESTIONS PRESENTED

The following language in the opinion delivered upon the rendering of the judgment sought to be reviewed provides background for the first question presented:

"Here the record is clear and undisputed that at the time appellant appeared in the probate court, appellee Cairns' petition for the appointment of the Hospital Trust as administrator was then and there pending. This fact in and of itself, in our opinion, effectively prevents appellant from exercising the duties of his office." (R. 21; Appx. A, p. 3).

QUESTION I

In the course of construing the 1950 amendment to Section 2 of the Public Administrator Act, R. I. Acts, 1876, ch. 567, as amended by R. I. Acts, 1950, ch. 2596, did the Rhode Island Supreme Court's interpretation of the phrase "no administration having been granted or proceedings therefor pending" to denote the Administration petition which contained the Respondent Cairns' allegation that he was a "remote cousin" of the Decedent deprive the Petitioner of his right of "property" to administer the Beazley Estate "without due process of law" within the meaning of U.S. Const. Amend. XIV, Sec. 1?

If the Rhode Island Supreme Court held correctly or as an independent state matter that the phrase "no administration having been granted or proceedings therefor pending" denotes the administration petition which contained the Respondent Cairns' allegation that he was a "remote cousin" of the decedent, then there is presented the second question, for which the following language in the opinion delivered upon the rendering of the judgment sought to be reviewed provides background: "In view of the pendency of the petition for administration at the time of the appellant's entry of appearance, we are compelled for the reasons stated herein to dismiss the instant appeal. Accordingly there is no need to consider the several other contentions set forth in the appellant's brief." (R. 23; Appx. A, p. 5).

QUESTION II

Did the Rhode Island Supreme Court deprive the Petitioner of his right to administer the Beazley estate, in violation of the procedural due process requirements of U.S. Const. Amend. XIV, Sec. 1, by refusing to consider and determine the merits of the Petitioner's Appeal from the Rhode Island Superior Court's Judgment which, inter alia, found the Respondent Cairns to be next of kin of the Decedent?

QUESTION III

Did the Rhode Island Supreme Court deprive the people of Providence of the free use of the Beazley estate assets, in violation of the procedural due process requirements of U.S. Const. Amend. XIV, Sec. 1, by refusing to consider and determine the merits of the Petitioner's Appeal from the Rhode Island Superior Court's Judgment which, inter alia, found the Respondent Cairns to be next of kin of the Decedent?

STATUTE INVOLVED

The case involves "*an Act providing for the appointment of a Public Administrator in the City of Providence*" (hereinafter Public Administrator Act), R. I. Acts, 1876, Ch. 567, as amended by R. I. Acts, 1950, Ch. 2596:

> "Section 1. The city council of the city of Providence may appoint some suitable person, being an inhabitant of said city, to be public administrator therein; and the person so appointed shall hold his office during the pleasure of the city council.
>
> Section 2. Such administrator shall take out letters of administration and faithfully administer upon the estate of any person who dies intestate within the City of Providence or elsewhere, leaving property in the said city to be administered *and no administration having been granted or proceedings therefor pending*, such person at the time of his decease not

being an inhabitant or resident of any other town or city in this State, and not leaving a known husband, widow or next of kin *within this State*, which fact shall be established by proof satisfactory to the Probate Court of the City of Providence.

Section 3. Administration shall not be granted to a public administrator within thirty days next after the decease of such intestate.

Section 4. After granting letters of administration to a public administrator, and before the final settlement of the estate, if the husband, widow or any next of kin of the deceased, in writing claims the right of administration, or requests the appointment of some other suitable person to the trust, the municipal court in the city of Providence shall grant letters of administration accordingly. Upon the appointment of a successor, and his giving the bond required, the powers of the public administrator over the estate shall cease.

Section 5. Such public administrator shall deliver into the municipal court his letters of administration upon the estate of any person deceased, if a will of such person is thereafter allowed and proved. Upon the appointment of an executor or administrator as his successor in any case, he shall surrender his letters of administration into the municipal court with an account upon oath of his doings thereon; and upon the allowance of his account by the municipal court, shall pay over and deliver to his successor all sums of money in his hands, and all property, effects and credits of the deceased not administered.

Section 6. Such public administrator shall give bond to the municipal court for the faithful performance of his duties, in like manner as required of other administrators, with the further conditions to comply with the provisions of the preceding section.

Section 7. Such public administrator may be licensed to sell real estate for the payment of debts, and

shall administer estates and render his account, in the same manner as other administrators, except as herein otherwise provided.

Section 8. When an estate has been fully administered by such public administrator, and the debts paid according to law, he shall deposit the balance of such estate remaining in his hands with the treasurer of the city of Providence, who shall receive and hold it for the benefit of those who may have lawful claims thereon.

Section 9. Such public administrator shall render an account of his proceedings to the municipal court of said city, at least once in each year, until the trust has been fulfilled. And when, upon a final settlement of any estate, it appears that moneys remain in the hands of such administrator, which by law should have been deposited with the city treasurer, the municipal court shall certify that fact and the statement of the amount to said treasurer, who, unless such deposit is made within thirty days after the receipt of such notice, shall cause the bond of the administrator to be prosecuted for the recovery thereof.

Section 10. All money or other property received by the city treasurer of the city of Providence, under the provisions of this act, shall be held for the same uses, as provided by chapter 177 of the General Statutes.

Section 11. Upon the death, resignation or other disqualification of a public administrator leaving an estate or estates not fully administered, it shall be the duty of the municipal court, upon application of the city treasurer, to appoint some suitable person to have the charge and care of the personal estate not administered, to hold the same until a successor to such deceased, resigned or disqualified public administrator shall be duly appointed, to whom the municipal court shall grant letters of administration de bonis non upon his giving the required bond.

Section 12. Upon the death, resignation or other disqualification of a public administrator, the city council shall fill the vacancy forthwith.

Section 13. When a public administrator neglects to return an inventory, settle an account, or perform any other duty incumbent upon him, (and there appears no heir entitled thereto), the city treasurer shall, in behalf of the said city of Providence, prosecute all suits and do all acts necessary and proper to ensure a prompt and faithful administration of the estate, and the payment of the proceeds thereof into the treasury."

Section 2, as amended, may be found in the Rhode Island Acts and Resolves of 1950 at pages 661-662. Sections 1, and 3 through 13 may be found in the Rhode Island Acts and Resolves of 1876, May Session, at pages 2-4, together with the original text of Section 2. (Italics have been supplied to show the phraseology added by the 1950 Amendment.)

STATEMENT

Ernest V. Beazley (decedent), late of Providence, Rhode Island, died on February 1, 1961. (R. 211, Ex. 11). He had never married. (R. 211, Ex. 11). He left no known next of kin him surviving in the State of Rhode Island. (R. 223, p. 157). He died intestate. (R. 223, pp. 126-127). His estate is the subject matter of this case. The right to administer is contested by the parties.

The Respondents are Gordon Cairns of East Clifton, Quebec, Canada, and the Rhode Island Hospital Trust Company (Hospital Trust), a Rhode Island banking corporation. The Petitioner is Martin Malinou of Providence, Rhode Island, who held the office of Public Administrator in and for Providence on the date of the decedent's death.[1] (R. 223, p. 133).

[1] The Public Administrator Act, Sec. 1 delegated the power to appoint a public administrator to the City Council of the City of Providence, Rhode Island (city council). The city council elected the Petitioner to be Public Administrator on January 2, 1961. The title to

On April 25, 1961, the Respondent Gordon Cairns caused to be filed in the Probate Court of the City of Providence, Rhode Island, a petition for the appointment of the Respondent Hospital Trust as administrator of the estate of Ernest V. Beazley (Beazley Estate). (R. 223, p. 124). In

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the office of Public Administrator has been in dispute since January 7, 1963, when the city council elected Leonard A. Kiernan to be Public Administrator. On January 4, 1965, the city council elected Francis J. Maguire to be Public Administrator. On January 2, 1967, the city council re-elected Francis J. Maguire. The Rhode Island Supreme Court may reach the question of who now holds the title in an action certified to it by the Rhode Island Superior Court, Perkins, J., and scheduled to be argued on October 3, 1967. The case, *Malinou v. Kiernan*, is docketed in the Rhode Island Supreme Court No. 44A. *(See Reasons for Granting the Writ, infra,* p. 21).

A city ordinance provides for the biennial election of a public administrator:

> "The city council shall elect on the first Monday in January biennially, commencing A.D. 1913, the following officers, namely: One or more viewers of fences; a pound keeper at the Dexter Asylum, and a pound keeper at Roger Williams Park; three or more port wardens; one or more packers of fish; *a public administrator*; an inspector of saleratus, bicarbonate of soda and cream of tartar; an inspector of chain cables; an inspector of beef and pork; a sealer of leather; one or more inspectors of hoops; one or more surveyors and corders of wood; one or more surveyors and measurers of stone; one or more inspectors and measurers of carpenters', masons' and painters' work; two or more measurers of grain, meal, salt and sea-coal; one or more weighers of cotton; one or more appraisers of damage under the dog law; one or more auctioneers; a fire marshal; a superintendent of the burial of deceased soldiers and sailors; six or more cattle weighers; one or more weighers of coal and other articles of merchandise." Providence Rev. Ord. (1946) Ch. 2, Sec. 157. (Italics supplied)

The Rhode Island General Assembly delegated to the city council the authority to establish a fee to be paid by the appointee to the office of public administrator. 7 R.I. Gen. L. (1956) 45-5-10. The city council established a fee of ten dollars to be paid by the appointee to the office of public administrator. Providence Rev. Ord. (1946) Ch. 2, Sec. 159.

his petition the Respondent Cairns claimed to be a "remote cousin" of the decedent. (R. 200). The Petitioner entered a written appearance in the probate court proceeding on May 16, 1961. (R. 180).

The court of first instance in this case was the Probate Court of the City of Providence (probate court) which is not a court of record. On May 26, 1961, the probate court entered a decree whereby it appointed the Respondent Hospital Trust administrator of the Beazley Estate. (R. 200). The Petitioner appealed from the probate court decree to the Rhode Island Superior Court.

A trial was held in Superior Court on March 2, 3, 4, and 8 of 1966, before a justice of the Superior Court and a jury. On March 10, 1966, the Superior Court entered a final judgment whereby it (1) found Respondent Gordon Cairns to be one of the next of kin of the decedent, (2) affirmed the May 26, 1961, probate court decree appointing Hospital Trust administrator of the Beazley Estate, (3) approved the petition of the Respondent Gordon Cairns for appointment of the Hospital Trust as administrator of the Beazley Estate, and (4) denied and dismissed the Petitioner's appeal from the May 26, 1961 probate court decree. (R. 39-40). The Superior Court judgment reads in part (R. 39): "The Court finds based upon the evidence presented (and considering the opinion of the jury) that Gordon Cairns is one of the next of kin of the deceased, Ernest V. Beazley." The Petitioner appealed from the Superior Court judgment to the Rhode Island Supreme Court.

On July 12, 1967, the Rhode Island Supreme Court rendered judgment in the last sentence of the opinion delivered therewith, as follows (R. 23; Appx. A, p. 5): "The appellant's appeal is denied and dismissed and the judgment appealed from is affirmed."

How the Federal Questions Are Presented

The Petitioner objected to the entry of the final judgment by the Superior Court. (R. 223, p. 205). At the time of the entry of the final judgment by the Superior Court and the Petitioner's objection thereto the Petitioner first sought to raise *Question I* concerning his claimed property right to administer the Beazley Estate. (R. 223, pp. 200-203):

> "MR. MALINOU: . . . As a matter of law, this court must determine the meaning of that part of Section 2 of the Public Administrator Act which says 'no administration having been granted or proceeding therefor pending . . .' My brother says that because the petition of his client, Gordon Cairns, was on file and no written petition was on file prior to that time by the appellant, that this bars the appellant's rights. Clearly, then, the court must interpret the meaning of 'no administration having been granted or proceeding therefor pending,' which came to be part of the Public Administrator Act in 1950, by the Public Laws of that year, Chapter 2596, and I argue to this court that a proper interpretation of that provision of the amendment is that it controls the rights between two public administrators contesting for the right to administer, so that if administration on an estate within the purview of this Act has been granted to a public administrator, whose term of office later terminates, then his successor has no right to succeed the public administrator who has been appointed. It also means that if an incumbent public administrator has filed a written petition for an administration on an estate within the purview of the Act and while it is pending – "

The trial court would not allow the Petitioner to continue and prevented him from articulating the federal issue designated *Question I*:

> "THE COURT: Again I'm going to interrupt you. You're getting off the subject. I've got a trial going, I might say, but you're getting off the subject,

because I defined the terms of that statute in my charge to the jury, and that became the law of the case; right law, wrong law, it is the law of the case. All we're trying to determine this morning is what further step must I, as the presiding judge at this trial, which was tried through a jury in accordance with 33-23-10 of our statute, which says 'If a matter of fact be in controversy, either party may at any time before the assignment date claim a jury trial.' That was done here. So I am concerned with that, and I am also concerned with Section 18 of the same title and chapter which is entitled 'Affirmance, reversal, or entry of new decree.' I think you're getting away from that. Let's get to the matter at hand, or I will render my decision without listening to anything else.

MR. MALINOU: All right. I understand my argument has been limited; if I may just register my objection to it.

THE COURT: I'm not trying to limit you to what you can say, so long as we're talking about the matter that is before the court and nothing else. You've gotten away from it a little bit.

MR. MALINOU: I thought I was talking about a matter that was relevant.

THE COURT: I disagree. Much of what you have been saying would be on matters on motion for a new trial, and certainly what you've been arguing about my interpreting of Section 2 I've already done in my charge to the jury, and that's the law of the case. All right."

The Petitioner again sought to raise the federal issue designated *Question I* by setting forth his right claimed under the Fourteenth Amendment in a *Motion To Alter Judgment* filed in the Superior Court on March 15, 1966. (R. 33, 38). The *Motion To Alter Judgment* reads in part as follows (R. 33):

"The Appellant moves that the judgment entered on March 10, 1966, whereby the decree of the Probate Court of the City of Providence entered on May 26, 1961, appointing the Rhode Island Hospital Trust Company administrator of the Estate of Ernest V. Beazley was affirmed, and whereby the Appellant's appeal was denied and dismissed, be altered and that the Appellant be appointed administrator of the Estate of Ernest V. Beazley, by reason of the undisputed facts that the late Ernest V. Beazley died intestate, leaving no known widow nor next of kin him surviving within this state, and that no public administrator other than the appellant had ever been granted the administration of the Estate of Ernest V. Beazley nor had any public administrator other than the Appellant sought to take out letters of administration thereon, and for the further reason that the judgment deprives the Appellant of his right of 'property' within the meaning of U.S. Const. Amend. XIV, Sec. 1: 'nor shall any state deprive any person of life, liberty, or property, without due process of law; . . . ' and as such property right vested in him on the date of the decedent's death (2/1/61) by virtue of the Public Administrator Act, Sec. 2: . . ."

On July 7, 1966, the Superior Court refused to allow the Petitioner to argue his *Motion To Alter Judgment* and refused to pass thereon. (R. 223, pp. 209-216, 235). The Superior Court declared (R. 223, pp. 213-216):

"THE COURT: . . . the motion to alter judgment can be filed only in those cases tried without a jury. This was definitely a jury trial – we had twelve people sitting here, at least–and they came in with a verdict, so I assume it was a jury trial, and under those circumstances 59e is not applicable, . . .

* * *

MR. MALINOU: Well, am I prohibited from arguing the motion to alter?

THE COURT: Yes. . . .

* * *

MR. MALINOU: I wouldn't wish to stand here and argue a point on which the court has already ruled against me, Judge, but I simply wanted to clear the matter up in my own mind, because in view of the ruling as I understand it now, I cannot argue the constitutional issue presented in this court, I would have to raise it for the first time in the Supreme Court . . .

THE COURT: That is my ruling."

The Petitioner raised the issue designated *Question I* in his brief filed in the Rhode Island Supreme Court on December 9, 1966. (R. 212). *Point XIX* of the brief reads in part (R. 212, p. 42):

> "In the course of construing the Public Administrator Act the Superior Court deprived the Appellant of his right of 'property' to administer the Beazley Estate 'without due process of law' within the meaning of U.S. Const. Amend. XIV, Sec. 1: 'nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .'
>
> "In the course of construing section 2 of the Public Administrator Act (full quote supra p. 23) the court applied the phrase 'no administration having been granted or proceedings therefor pending' to the instant contest between Gordon Cairns and the Appellant when in law the phrase has no application except as between public administrators. (See *Point I*) . . ."

Point I of the Petitioner's brief reads in part (R. 212, p. 23):

> "The Appellant submits that the purpose of the 1950 amendment phrase here in question is twofold. First, it is to secure to a public administrator who has been granted administration on an estate within the purview of the act the right to continue in the trust after the appointment and qualification of his successor. Second, it is to secure to a public administrator at the time

of the creation of an estate within the purview of the act a right to administer such estate prior to his successor if he applies for letters of administration thereon before his successor applies therefor."

Question II

Petitioner's claim of a violation of procedural due process which presents the issue designated *Question II* arising from the Rhode Island Supreme Court's refusal to consider and determine the merits of the Petitioner's appeal from the Rhode Island Superior Court judgment which, inter alia, found the Respondent Gordon Cairns to be next of kin of the decedent, is raised for the first time in these papers. The Rhode Island Supreme Court declined to entertain the Petitioner's petition for reargument. (R. 3). The petition for reargument contained the claim of a violation of procedural due process required by the Fourteenth Amendment which presents the issue designated *Question II.* (R. 10). The Petitioner's petition for reargument stated as one ground for reargument that (R. 10):

> "The decision of this Court filed on July 12, 1967, deprives the Appellant of procedural due process of law by refusing to consider and determine the merits of his appeal and denying and dismissing his appeal for original lack of standing before the probate court, contrary to U.S. Const. Amend. XIV, Sec. 1: 'nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .' ".

Question III

Petitioner's claim, on behalf of the people of Providence, of a violation of procedural due process, which presents the issue designated *Question III*, arising from the Rhode Island Supreme Court's refusal to consider and determine the merits of the Petitioner's appeal from the Rhode Island Superior Court judgment which, inter alia, found Respondent Cairns to be next of kin of the decedent, is raised for the first time

in these papers. The Petitioner's claim, on behalf of the people of Providence, is fairly comprised within the ground for reargument contained in the Petitioner's petition for reargument to the Rhode Island Supreme Court (R. 10) which is referred to and quoted supra. As aforesaid, the Rhode Island Supreme Court declined to entertain the Petitioner's petition for reargument. (R. 3).

REASONS FOR GRANTING THE WRIT

I

The judgment should be reviewed because it presents a novel and important question of federal constitutional law comprised within *Question I*, to wit: *Is a Contract Right "Property" within the meaning of the Fourteenth Amendment of the Constitution of the United States?*

The basis of the Petitioner's claim of a property right to receive the grant of administration on the Beazley Estate is founded in a conract which, the Petitioner claims, was entered into between the Petitioner and the State of Rhode Island at the time of the creation of the Beazley Estate. The terms of the contract, the Petitioner claims, are set forth in the Public Administrator Act which had been enacted as a means to accomplish an object which the State wished to promote: the custody and care of intestate property of deceased persons, derelict from the absence of claimants, and its preservation from being wasted or intruded on by strangers, to the disinherison of the heirs, or to the loss to the legal representatives, when they might come to demand it. The object was deemed beneficial to the State. This benefit, the Petitioner claims, constituted the consideration to be given by the Petitioner and received by the State for the right granted the Petitioner to administer the Beazley Estate.

The decedent was a resident of Providence (R. 211, Ex. 11), and he died intestate (R. 223, p. 158), leaving no known widow or next of kin him surviving within the State

of Rhode Island (R. 223, p. 157). These are undisputed facts. Also undisputed are the facts that the decedent died during the Petitioner's term of service as Public Administrator (R. 223, p. 133) and that no other public administrator had been granted administration on the Beazley Estate or had instituted proceedings for administration thereon (R. 223, p. 126). On these simple facts the Petitioner bases his contractual claim of right to receive the grant of administration of the Beazley Estate, for these facts satisfy all the conditions precedent to the Petitioner's right to administer as set forth in Section 2 of the Public Administrator Act.

This Court has recognized the right of a state to contract with a private person for the exercise of a part of its sovereign powers by that private person. See *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518. However, this Court has not considered the question whether or not a contract right is such "property" as is protected by the due process clause of the Fourteenth Amendment of the Constitution of the United States.

Assuming that the Due Process Clause of the Fourteenth Amendment does protect contract rights, and that Section 2 of the Public Administrator Act grants the Petitioner a contract right to administer the Beazley Estate because the decedent was a resident of Providence, died intestate, left no known widow or next of kin in Rhode Island, and because no public administrator other than the Petitioner had sought or received letters of administration on the Beazley Estate, then the Rhode Island Supreme Court's interpretation of Section 2 of the Act, construing the 1950 Amendment to Section 2 to mean that the Petitioner must file for administration before anyone else files for administration, constitutes a deprivation of the Petitioner's property right to administer the Beazley Estate without due process of law.

This Court has recognized that a litigant may be deprived of rights protected by the Due Process Clause of the Fourteenth Amendment by state court action and that the de-

privation may be accomplished by a state court in the course of construing a state statute. See *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673. State court action, in the form of the judgment sought to be reviewed, which deprives the Petitioner of his property right to receive the grant of administration on the Beazley Estate, is what the Petitioner is complaining of in these papers. The non-federal ground upon which the judgment is founded, *i.e.*, the interpretation of Section 2 of the Public Administrator Act to denote administration proceedings instituted by non-public administrators as being "proceedings. . . pending" is so interwoven with the federal question of whether or not the Act granted the Petitioner a contract right to administer the Beazley Estate, which contract right is the Petitioner's "property", as not to be an independent state matter of statutory construction.

Where, as here, the Rhode Island Supreme Court's interpretation of the 1950 Amendment to Section 2 of the Public Administrator Act is so interwoven with the federal question presented (*Question I*) this Court has recognized its jurisdiction "is plain". *Enterprise Irrig. Distr. v. Farmers' Mut. Canal Co.*, 243 U.S. 157, 164.

II

The judgment should be reviewed because it is plain error for the Rhode Island Supreme Court to refuse to review the Petitioner's contentions that the Superior Court erred in finding the Respondent Cairns to be next of kin of the decedent. The Supreme Court's error is plain in fact because the *sine qua non* of the rationale of the judgment sought to be reviewed is that the Respondent Cairns is next of kin of the decedent. The error is plain in law. — A state statute provides that an appeal should be heard and determined by the Rhode Island Supreme Court. 2 R.I. Gen. L. (1956) 9-24-11. The due process clause of the Fourteenth Amendment to the Constitution of the United States requires a court to hear and determine the matters which are properly brought before it. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673.

Although the apparent rationale of the judgment is that the Petitioner lacked standing before the probate court because of the pendency of another person's (Respondent Cairns') petition for administration at the time of the Petitioner's appearance therein, without regard to whether that person had an interest in the Beazley Estate or was a stranger, a close analysis of the opinion delivered on the rendering of the judgment sought to be reviewed shows that the real rationale of the opinion is that the Petitioner lacked standing before the probate court at the time of his appearance therein because of the pendency of the petition for administration of a person (Respondent Cairns) whose status was that of next of kin of the decedent.

Although the Petitioner's claim (presented by *Question II*) that the Rhode Island Supreme Court's refusal to review the merits of his appeal violated procedural due process is raised for the first time in these papers, it is because that claim and the issue it presents were born in the surprise judgment sought to be reviewed. In his petition for reargument the Petitioner presented the issue re-articulated in these papers as *Question II.* (R. 10). The Rhode Island Supreme Court declined to entertain the Petitioner's timely petition for reargument. (R. 3). Therefore, the claim could be raised in no other way than by these papers. This Court has held that a federal question raised for the first time in papers addressed to this Court is raised at the proper time if the question is born in the judgment of the highest court in which a judgment could be had and a timely petition for reargument therein is declined. See *Saunders v. Shaw*, 244 U.S. 317, 320. See also *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673.

III

The judgment should be reviewed because it substantially deprives the people of Providence of the services of the Public Administrator in this case and in future cases. The judgment nullifies the legislative purpose of the Public Administrator Act, *i.e.*, the protection of estates within the pur-

view of the Act from intrusion thereon by strangers, and accomplishes the nullification by depriving the Public Administrator of the right to contest for letters of administration against a person who alleges a justiciable interest in an estate if such person has filed a petition for administration in the probate court before the Public Administrator files his petition for administration. The judgment reaches the result of requiring a public administrator to be omnicient, for in order to file the first petition for administration on an estate within the purview of the Act a public administrator must know that such an estate has been created and that some other person is about to institute administration proceedings thereon, although a public administrator may never receive legal or actual notice of the fact that such an estate has been created or that some other person is about to institute administration proceedings thereon.

IV

The judgment should be reviewed because the people of Providence have an economic interest (*i.e.*, the use, without the payment of interest, of the Beazley Estate assets in the absence of distributees) in obtaining Rhode Island Supreme Court review of the Rhode Island Superior Court finding that Respondent Cairns is next of kin of the decedent. The Petitioner is the appropriate representative of the people of Providence to seek review of the Rhode Island Superior Court finding because it is the Petitioner's duty to pay over the balance of any estate he has fully administered to the City Treasurer who must hold it for the use of the City of Providence. Public Administrator Act, Secs. 8, 10.[2] The economic right of the people of Providence who

[2] Despite the repeal of R. I. Gen. Stat., 1872, Ch. 177, Sec. 6 (now 6 R. I. Gen. L. (1956) 33-21-8) by P. L. 1961, Ch. 195, Sec. 2, whereby the State took from the City of Providence the beneficial use of the personal estates of resident decedents dying intestate without known spouses or next of kin, it remains in force respecting the use of estates (such as the Beazley Estate) which came into existence prior to the approval of P. L. 1961, Ch. 195 on June 10, 1961. See *Attorney General v. City of Providence*, 8 R. I. 8 (1862).

are not individually before the Court cannot be effectively vindicated except through the Petitioner. This Court has exercised its jurisdiction over cases "where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court," as when the N.A.A.C.P. was acting on behalf of its members. *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 459-460. And in *Baker v. Carr*, 369 U.S. 186, 204-208, this Court held that individual voters have standing to raise the issues, in order to vindicate "an interest of their own, and of those similarly situated".

V

The judgment should be reviewed because the question of whether or not a public administrator acquires a Fourteenth Amendment "property" right to receive the grant of administration on an estate within the purview of the Public Administrator Act at the time of the creation of such an estate is a question which is involved in several cases now pending before the courts of Rhode Island. The majority of cases involve estates originally administered by the Petitioner's predecessor, Bernard J. Gallagher who died on September 14, 1962. Since the city council elected Leonard A. Kiernan to be Public Administrator on January 7, 1963, and elected Francis J. Maguire to be Public Administrator on January 4, 1965, and re-elected Francis J. Maguire to be Public Administrator on January 2, 1967, the pending cases involve actual and potential three-party contests for the grants of administration de bonis non. (The Public Administrator Act, Section 11 provides that a public administrator shall succeed his deceased predecessor as administrator de bonis non.) Therefore, an early and definitive ruling is desirable on the issue of whether or not a public administrator is vested with a "property" right in the grant of administration on an estate created during his term of service. The question will lurk in the labyrinth of future cases every time the Providence City Council elects a new public administrator, for human nature being what it is

and the emoluments for a public administrator's services being only the fees awarded out of the assets of those estates committed to his care (R. 223, p. 159), it is likely that each newly elected public administrator will seek to replace his predecessor as administrator of estates within the purview of the Act. This suggestion is not an imaginary hypothetical situation. It constitutes the facts of Case No. 44A on the current argument list of the Rhode Island Supreme Court, styled *Martin Malinou, Public Administrator v. Leonard A. Kiernan, Public Administrator.* The Intervenor in that case, Francis J. Maguire, who is claiming title to the office of Public Administrator, is claiming the exclusive right to administer the estate of the late Carrie Cumber which is the subject of that case. In that case the instant Petitioner claims a property right in the grant of administration de bonis non on the theory that the right to administer was transferred to him under Public Administrator Act, Section 11 on the death of his predecessor who had received the original grant of administration and who died during the Petitioner's term of service.

VI

The judgment should be reviewed because, while the Rhode Island Supreme Court avows that it is construing the Public Administrator Act, that court has arrogated to itself the political[3] function of deciding that the Public Administrator should not be permitted to be an "intermeddler" (R. 22; Appx. A, p. 4) in probate administration proceedings instituted by alleged[4] kin of an intestate. The tone of the

[3] At the time of the introduction and passage of the 1950 Amendment to Section 2 of the Public Administrator Act the Petitioner's predecessor in the office of Public Administrator, the late Bernard J. Gallagher, was not only the Public Administrator but he was also a member of the Rhode Island House of Representatives. The amendatory legislation originated in the Rhode Island House of Representatives. H-910, Jan. Sess. (1950).

[4] At the probate court hearing the Respondents did not offer evidence to support the Respondent Cairns' claim to heirship (R. 218,

opinion delivered upon the rendering of the judgment sought to be reviewed bespeaks an arrogation of a political role. With the same pertinent facts (*i.e.*, that the Petitioner appeared in the probate court after the Respondent Cairns had filed his administration petition) before it a differently constituted Rhode Island Supreme Court in 1962 recognized the Petitioner's right to contest the claim to heirship of the respondent Cairns, and recognized the petitioner's right to receive a review of the merits of his appeal from the judgment of the Rhode Island Superior Court. The Rhode Island Supreme Court in 1962 declared (R. 156):

> "We do not deem the circumstances in the case at bar as disclosed by the return to be so exceptional as to require immediate review. And it is otherwise clear therefrom that the superior court acted within its jurisdiction in passing upon the respondents' motion for the dedimus in question. Whether it erred in allowing the dedimus to issue ex parte is quite another question. However, if after the final determination of his claim of appeal the petitioner is aggrieved by the superior court's refusal to sustain the grounds of his motion to quash and grant the same he may then have such action reviewed by a bill of exceptions." Condon, C. J. in *Malinou v. Cairns*, 94 R. I. 279, 281.

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pp. 10-11) other than to offer the petition (R. 200) in which the Respondent Cairns alleged that he was a "remote cousin" of the decedent. The Respondent Cairns never did testify or attend the hearing in the probate court (R. 218, pp. 10-11) nor did he testify or attend the trial in the superior court (R. 224, p. 33). An inspection of the record will show that the only demeanor testimony offered by the Respondents at the superior court trial was the testimony of a geneologist who the trial court allowed to give opinion testimony to the effect that the Respondent Cairns was the decedent's "next of kin" and "second cousin once removed". (R. 223, p. 18).

CONCLUSION

For the reasons set forth above it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Dated: October, 1967

APPENDIX A

OPINION OF THE RHODE ISLAND SUPREME COURT

(Delivered July 12, 1967 (R. 18))

KELLEHER, J. This is an appeal from a decree of the probate court of the city of Providence appointing one of the appellees, the Rhode Island Hospital Trust Company, hereinafter called Hospital Trust, administrator of the estate of Ernest V. Beazley. After a trial in the superior court, the jury returned a verdict which found that the other appellee, Gordon Cairns, was a next of kin of the intestate. Thereafter, the superior court entered a judgment which was based on the jury's verdict wherein the action of the probate court was ratified, confirmed and approved. The appellant's motion for a new trial being denied, he is before us with a myriad of objections taken to several rulings of the trial justice.

A chronological recitation of the pertinent facts of the case will aid in a fuller understanding of this appeal. On February 1, 1961, Ernest V. Beazley died intestate a resident of Providence. On this date, appellant was the public administrator for this city. No probate proceedings were initiated in the instant estate until April 25, 1961, when appellee, a resident of Quebec, Canada, caused to be filed in the Providence probate court a petition wherein he requested that Hospital Trust be appointed administrator of his cousin's estate. In his petition, appellee described himself and three other individuals as "remote" cousins of the deceased.

On May 13, 1961, appellant, in his official capacity, filed in the probate court an entry of appearance in the instant estate. Later, on May 26, 1961, the court entered a decree which designated Hospital Trust as administrator of the decedent's estate. The appellant in perfecting his appeal from this action to the superior court contends that he, rather than the Hospital Trust, should have been appointed the administrator.

This marks the second time appellant has appeared before us on the instant estate. In 1962 he sought to enjoin the taking of a deposition which was subsequently used in the trial of this cause in the superior court to show the relationship between appellee, Gordon Cairns, and the deceased. See *Malinou v. Cairns*, 94 R. I. 279, 180 A.2d 446.

We believe that there is a threshold issue which must be considered before any consideration can be afforded to the merits of the several contentions made by appellant. The fundamental question to be resolved involves the standing of appellant to object to the appointment of an administrator in the instant estate. To be specific, can appellant under the provisions of the act which created the office of public administrator for the city of Providence qualify to serve as administrator here? We think not.

The office of public administrator is quasi-public in nature and one of its paramount functions is to insure that no estate shall lie dormant or unadministered for an undue length of time for want of an interested party to petition for administration. 21 Am. Jur., Executors and Administrators, § 795, p. 828. As public administrator for Providence, appellant's authority here is based upon the statute which created this office and any amendments which may have been made thereto.

The authority of appellant is found in P. L. 1876, chap. 567, which is entitled "An Act Providing for the Appointment of a Public Administrator in the City of Providence," as amended by P. L. 1950, chap. 2596, the pertinent portion of which reads as follows:

> "Section 2. Such administrator shall take out letters of administration and faithfully administer upon the estate of any person who dies intestate within the city of Providence or elsewhere, leaving property in the said city to be administered and no administration having been granted or proceedings therefor pending, such person at the time of his decease not being an inhabitant or resident of any other town

> or city in this state, and not leaving a known husband, widow or next of kin within this state, which fact shall be established by proof satisfactory to the probate court of the city of Providence."

It is clear that appellant's function is to serve as administrator only in those circumstances which come within the purview of the legislation which gives vitality to the position of the public administrator. In *Malinou v. Mears*, 97 R.I. 15, 195 A.2d 232, we stated that the language set forth above limited the official interest of the public administrator to those estates where three conditions exist, namely, intestacy, an absence of known next of kin, and no prior pending proceeding for administration. We reaffirmed this holding in *Malinou v. Rosedale*, 97 R.I. 277, 197 A.2d 289.

In order for appellant to have any standing before the probate court, there must be a concurrence of all three conditions before he has any right or interest in an estate. Absent one of the three, the public administrator has no standing. Here the record is clear and undisputed that at the time appellant appeared in the probate court, appellee Cairns' petition for the appointment of the Hospital Trust as administrator was then and there pending. This fact in and of itself, in our opinion, effectively prevents appellant from exercising the duties of his office.

The appellant acknowledges that by the terms of the statute he can become the administrator of an estate only when there are no prior proceedings for administration pending. His attempts to construe and interpret the language setting forth this condition so that it will have no applicability to the instant appeal have no merit whatsoever. To repeat them here would only serve to obfuscate the plain basic everyday English employed by the legislative draftsman. The language used is clear beyond any doubt and admits of and needs no sophisticated statutory interpretation or construction. The general assembly, when it promulgated this condition, demonstrated an unmistakable intent that it did not desire the public administrator, whoever

he may be, to be an intermeddler or engage in active competition with others for the appointment as the administrator of an estate which satisfies the other requirements of P. L. 1876, chap. 567, sec. 2, as amended. It is our opinion that if a petition for administration has been filed by an individual who alleges therein that he comes within the purview of G. L. 1956, § 33-8-8[1], the appellant is precluded thereby from asserting any right to take charge and administer the decedent's estate. The appellant's functions are restricted by statute to those cases where there has been a complete failure by any of the aforedescribed persons to initiate probate proceedings.

The fact that appellee's petition was not filed until more than 80 days after Ernest V. Beazley's death on February 1, 1961, is of no consequence. Although § 33-8-8 provides that a widow, surviving husband and/or next of kin may file a petition for administration within 30 days of the death of an individual, this does not mean that, unless they act within that period of time, they are forever barred from asserting such a right. In discussing this statutory provision, and a contention similar to that espoused here by appellant, this court in *Fortin v. Tanguay*, 75 R.I. 102, 105, 64 A.2d 188, 190, stated that such a construction, which would penalize a surviving spouse or next of kin for their failure to com-

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[1] § 33-8-8. "Administration of the estate of a person dying intestate shall be granted as follows:

"*First.* To the widow or surviving husband or one or more of the next of kin, or to the widow or surviving husband jointly with one or more of the next of kin, they being suitable persons and competent.

"*Second.* If the widow or surviving husband and the next of kin shall neglect to apply for letters of administration within thirty (30) days after the decease of a person intestate, or shall be unsuitable for the discharge of the trust, or renounce the administration, the probate court may, on petition therefor of some party in interest, grant administration to any suitable person."

mence proceedings within the permitted period, was unreasonable. We have repeatedly stated that the right to administer follows the right to inherit. Nothing contained in § 33-8-8 in any way derogates or erodes that long-established principle.

In view of the pendency of the petition for administration at the time of the appellant's entry of appearance, we are compelled for the reasons stated herein to dismiss the instant appeal. Accordingly there is no need to consider the several other contentions set forth in the appellant's brief.

The appellant's appeal is denied and dismissed and the judgment appealed from is affirmed.

APPENDIX B

OPINION OF THE RHODE ISLAND SUPERIOR COURT

(Delivered March 10, 1966 (R. 223, p. 205))

CARRELLAS, J. All right. Now, the court has looked at Rules of Civil Procedure 39(c), which says, "Advisory Jury and Trial by Consent." I have also looked at Rule 58, particularly (a)(2), which says, "upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it." That is what was done in this case. We had the interrogatories, the jury answered all four questions in the affirmative, and the judgment was entered to the effect that Gordon Cairns was a next of kin.

Now Mr. Malinou raises the question of whether Mr. Cairns might be a distributee, and in my charge to the jury I defined next of kin, and I am going to mention it in part. I went into more detail on it, by anyway, next of kin would be a blood relative of a person who in case of his death intestate will be entitled by virtue of the statute of distribution to share his estate. So that the jury, by finding that Mr. Cairns was a next of kin, found that he also is a distributee.

Mr. Malinou also raises the question of the language in the Act as alleged by Section 2 as amended in 1950 by Public Laws 2596, the language, ". . . . no administration having been granted," and I charged the jury that they had to find that their petition for administration, that is the appellee, was filed prior to any petition therefor by the appellant. That is also as I interpret that statute, and I base that on *Malinou v. Mears*, 195 Atlantic 2d, so that became the law of the case, whether it became good or bad law, it is the law of the case.

Now, in view of Section 33-23-18, which I don't think has been amended, in fact I'm quite certain of it, but I'm

going to doublecheck – it has not – which says, "The superior court may, upon appeal, affirm or reverse, in whole or in part, any order or decree of a probate court, and may enter such decrees therein as the probate court ought to have entered." So that under that section the court finds that based upon the evidence presented, based upon the judgment of the jury, both in the interrogatories and in their general verdict, and were I sitting without the benefit of the jury, I also would have so found, that Gordon Cairns is one of the next of kin of the deceased, Ernest V. Beazley; that the decree of the probate court of the City of Providence entered on May 26, 1961, appointing the Rhode Island Hospital Trust Company administrator of the estate of Ernest V. Beazley, deceased, is hereby ratified, confirmed and affirmed; that the petition of Gordon Cairns for the appointment of the Rhode Island Hospital Trust Company to serve as the Administrator of the estate of Ernest V. Beazley is approved. Further, that the appellant's appeal is denied and dismissed.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 712

MARTIN MALINOU,
PUBLIC ADMINISTRATOR,
PETITIONER,

v.

GORDON CAIRNS,
RHODE ISLAND HOSPITAL TRUST
COMPANY, ET AL.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

BRIEF FOR RESPONDENTS IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents pray that the petition for writ of certiorari to review the judgment of the Supreme Court of the State of Rhode Island in the case of *Martin Malinou, Public Administrator* v. *Gordon Cairns, Rhode Island Hospital Trust Company, et al.*, rendered on July 12, 1967, be denied.

Opinions Below

The opinion of the Rhode Island Supreme Court is unofficially reported in 231 A.2d 785 and is correctly set forth in the Petitioner's Brief for Certiorari, Appendix A. The other opinions below are substantially as indicated by the Petitioner in his Brief at 2.

Jurisdiction

The jurisdiction is set out in the Brief for Petitioner at 2.

Question Presented

Was the Supreme Court of Rhode Island correct in its decision to deny and dismiss the appeal made by the Public Administrator?

Statute Involved

The statute is entitled "*An Act providing for the appointment of a Public Administrator in the City of Providence.*" Rhode Island Acts and Resolves, 1876, Ch. 567 as amended by Rhode Island Public Laws 1950, Ch. 2596, Sec. 2. This statute is set out correctly and in its entirety as amended in Brief of Petitioner at 4-7.

Statement

The Respondent, Gordon Cairns of East Clifton, Quebec, Canada, a remote cousin of Dr. Ernest Valentine Beazley of Providence, Rhode Island, petitioned the Probate Court of the City of Providence on April 25, 1961, for the administration of Dr. Beazley's estate. Ernest Valentine Beazley had died on February 1, 1961. Gordon Cairns nominated

the Rhode Island Hospital Trust Company, a Rhode Island banking corporation, to the trust of administrator, and the latter was appointed by decree of the Probate Court dated May 26, 1961 (Ex. 16, Record, vol. 3, p. 141). Dr. Beazley died intestate leaving no widow or children. No next of kin were located in Rhode Island.

More than two weeks after the filing of the administration petition by Gordon Cairns, the Petitioner herein, Martin Malinou, the Public Administrator for the City of Providence, entered his appearance for the administration of the estate. The date of his entry of appearance was May 13, 1961 (Record, vol. 3, p. 135). The Public Administrator filed a claim of appeal from the Probate Court's decree on June 23, 1961.

The trial of the case occurred before a jury in the Rhode Island Superior Court March 2, 3, 4 and 8, 1966 (Record, vol. 3). The jury rendered a general verdict in favor of the respondents, Gordon Cairns and the Rhode Island Hospital Trust Company (Record, vol. 3, p. 196). The Superior Court denied the Public Administrator's motion for a directed verdict (Record, vol. 3, p. 197). Further, on July 7, 1966, the Public Administrator moved for a new trial which was denied (Record, vol. 3, pp. 229-232, 243).

The Petitioner appealed to the Supreme Court of Rhode Island and the opinion of that court was rendered on July 12, 1967, denying the Petitioner's appeal and affirming the judgment of the Superior Court. *Malinou* v. *Cairns,* R.I. 1967, 231 A.2d 785.

Argument

The Supreme Court of Rhode Island reached the correct decision on the facts of this case which involves a strictly local matter and is not a federal question warranting issuance of a writ of certiorari.

I

The United States Supreme Court should accept the construction placed upon Section 2 of the Public Administrator Act by the Supreme Court of Rhode Island.

The statute involved here is found in Rhode Island Acts and Resolves, 1876, Ch. 567 as amended by P.L. 1950, Ch. 2596, and it is set out in Petitioner's Brief pp. 4-7. The policy of the United States Supreme Court in a long line of cases has been to accept the construction of a state statute rendered by the state's highest court. *United States* v. *Burnison,* 339 U.S. 87, 70 S.Ct. 503, 94 L.Ed. 675 (1950), *Greenough* v. *Tax Assessors,* 331 U.S. 486, 67 S.Ct. 1400, 91 L.Ed. 1621 (1946), *Dorchy* v. *Kansas,* 272 U.S. 306, 47 S.Ct. 86, 71 L.Ed. 248 (1926), *Diaz* v. *Gonzalaz Y Lugo,* 261 U.S. 102, 43 S.Ct. 286, 67 L.Ed. 550 (1923). Section 2 of the Public Administrator Act has been interpreted by the highest court of Rhode Island on several occasions. *Malinou* v. *Rosedale,* 97 R.I. 277, 197 A.2d 289 (1964), *Malinou* v. *Mears,* 97 R.I. 15, 195 A.2d 232 (1963).

The statute obviously was designed to facilitate the handling of estates which might otherwise be neglected. *Malinou* v. *Cairns,* 231 A.2d 785, 786. Such neglect would create difficulties for creditors and a waste of assets which could otherwise be utilized for the commonweal.

II

The Public Administrator has no right to the administration of the Estate of Ernest Valentine Beazley; therefore the application of the statute as made does not deprive him of any property right in conflict with the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Any right in the Public Administrator to administer the estate must come to him by virtue of Section 2 of the

Public Administrator Act which specifically prescribes when the Public Administrator shall take out letters of administration. It reads:

> Such administrator shall take out letters of administration and faithfully administer upon the estate of any person who dies intestate within the city of Providence or elsewhere, leaving property in the said city to be administered and no administration having been granted or proceedings therefor pending, such person at the time of his decease not being an inhabitant or resident of any other town or city in this state, and not leaving a known husband, widow or next of kin within this state, which fact shall be established by proof satisfactory to the probate court of the city of Providence. Rhode Island Acts and Resolves, 1876, Ch. 567, Sec. 2 amended by P.L. 1950, Ch. 2596.

The Rhode Island Supreme Court in *Malinou* v. *Rosedale,* 97 R.I. 277, 280, 197 A.2d 289, 291 (1964) reaffirmed its earlier construction of this section by holding that:

> [T]he legislature intended . . . to confer an interest or right in an estate upon the public administrator only where the three conditions prescribed therein concurred, "namely, intestacy, an absence of known next of kin, *and no prior pending proceedings for administration.*" *Malinou* v. *Mears,* 97 R.I. 15, 16, 195 A.2d 232, 233. (Emphasis added)

The three conditions set out here are in the conjunctive and it is incumbent upon the Public Administrator to show that all three existed.

In the case presently before the court it becomes apparent after checking the filing dates in the Probate Court that *administration proceedings were pending* when the Public Administrator entered his appearance. So obvious are the facts that the Supreme Court stated in its opinion below:

> Here the record is clear and undisputed that at the time appellant appeared in probate court, appellee Cairns' petition for the appointment of the Hospital Trust as administrator was then and there pending. This fact in and of itself, in our opinion, prevents appellant from exercising the duties of his office.
>
> . . . The general assembly, when it promulgated this condition, demonstrated an unmistakable intent that it did not desire the public administrator, whoever he may be, to be an intermeddler or engage in active competition with others for the appointment as the administrator of an estate which satisfies the other requirements of P.L. 1876, Chap. 567, sec. 2 as amended. *Malinou* v. *Cairns*, 231 A.2d 785, 787.

In order to attempt to show a violation of the Fourteenth Amendment, the Petitioner must first be possessed of a property right. The right he has is his only by grace of legislative enactment which in this case is clear upon its face and in and of itself does not violate any constitutionally protected right of the Petitioner or the people of the City of Providence.

III

The Rhode Island Supreme Court did not err by refusing to review the Petitioner's contention that the Respondent Cairns is not the next of kin of decedent.

In his Brief pp. 17-18 the Petitioner urges upon this court a peculiar construction of the Rhode Island court's opinion. He claims that the *sine qua non* of the rationale of that opinion is that Respondent Cairns is next of kin of decedent. The court makes no such determination, nor is any such determination intimated. The court has merely looked at the statute and the prior cases and said that there must be no prior pending proceedings in the probate court if the public administrator is to exercise his function. There is no justification for the Petitioner's fictitious distinction between the "apparent" and "real" rationale of the opinion. Petitioner's Brief at 18. There is only one rationale.

Again the Public Administrator Act does not say that there be no prior pending proceedings *by next of kin;* it says only "no administration having been granted or proceedings therefor pending."

It should be noted here that administration only is the issue, not distribution of the estate. The state provides other machinery for the protection of a person's property after death and such is not the function of the public administrator's office.

In his Brief p. 22, the Petitioner suggests that the Rhode Island Supreme Court sitting in 1962 took a different view of this case than did the present court. This is not so. In 1962 the case of *Malinou* v. *Cairns,* 94 R.I. 279, 180 A.2d 446, was before that court on a writ of certiorari to determine if the Superior Court had erred in its decision denying the Public Administrator's motion to vacate an *ex parte* order for a *dedimus potestatem* to

take depositions outside the state. The court in that case denied and dismissed the petition for certiorari and quashed the writ already issued. That court never dealt with the Petitioner's right to contest the claim to heirship, The Petitioner was told only that if there were errors in his case, a bill of exceptions would be his proper remedy at the proper time.

Conclusion

For the foregoing reasons the Respondents respectfully request that the court deny the petition for a writ of certiorari to the Supreme Court of Rhode Island.

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November, 1967

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In the

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

PETITION FOR REHEARING

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ON PETITION FOR WRIT OF CERTIORARI
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OF RHODE ISLAND

PETITION FOR REHEARING

Petitioner presents his petition for a rehearing of this Court's order dated December 18, 1967, denying the petition for a writ of certiorari to the Supreme Court of Rhode Island, and, in support thereof, respectfully shows:

GROUNDS FOR REHEARING

Twenty-eight days after the Petitioner filed his petition for certiorari, the Rhode Island Supreme Court *sub silentio* changed the law on which it reasoned the judgment sought to be reviewed. This Court has in the past granted a rehearing of its order denying certiorari where an intervening new state case changed applicable state law and made reconsideration by the court which rendered the judgment an appropriate action in light of the new decision. *Conner v. Simler*, 367 U.S. 486.

In *Malinou v. Kiernan*,[1] decided November 7, 1967, 128 days after the Rhode Island Supreme Court rendered the judgment sought to be reviewed, the Rhode Island Supreme Court *sub silentio* changed its interpretation of the phrase "no administration having been granted or proceedings therefor pending" contained in the 1950 Amendment to Section 2 of the Public Administrator Act, R. I. Acts, 1876, Ch. 567, as amended by R. I. Acts 1950, Ch. 2596. The opinion of the Rhode Island Supreme Court delivered upon the rendering of its judgment in *Malinou v. Kiernan* has not yet been officially reported; it is unofficially reported in 235 A.2d 105; and it is printed in Appendix A hereto. (The judgment is contained in the opinion.)

The *sub silentio* change of interpretation has the effect of granting the public administrator standing to be heard in the probate court and to appeal therefrom, regardless of the fact that administration proceedings brought by another party-in-interest are pending at the time of the public administrator's appearance therein. (Under Rhode Island law a party-in-interest is one who has a justiciable interest. *Spooner v. Tucker*, 86 R.I. 266.) The facts of *Malinou v. Kiernan* are

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[1] A petition for a writ of certiorari will be filed in this Court on or before February 5, 1968, seeking review of the judgment rendered by the Rhode Island Supreme Court on November 7, 1967, in *Malinou v. Kiernan.*

that one claimant to the title to the office of public administrator filed a petition for administration d/b/n on the estate of the late Carrie Cumber, after his predecessor in the office of public administrator died without having fully administered the estate. Thereafter, the second claimant to the title (whom the Rhode Island Supreme Court found to be the holder of the title at the time of the filing) filed a similar petition. The Rhode Island Supreme Court, without reference to the early-bird philosophy contained in its opinion delivered upon the rendering of the judgment sought to be reviewed, held that no error inhered in the probate court's grant of administration d/b/n to the second claimant. The court further held that the second claimant did not "resign or forfeit the administratorship" (Appx. A, p. 7) of the estate when he (the second claimant) ceased to be public administrator, but remained the administrator thereof. Speaking of the responsibilities of a public administrator under Section 11 of the Public Administrator Act (which establishes the right of a public administrator to complete the administration of an estate left unfinished by his predecessor in office), the court held that Section 2 of the Public Administrator Act is incorporated in Section 11, stating (Appx. A, p. 3): "The responsibilities of a public administrator to which we refer include that established in sec. 2 of the act, . . .".

With the *sub silentio* change of interpretation in *Malinou v. Kiernan*, the Petitioner's claim of a deprivation of his right to administer the Beazley Estate without Fourteenth Amendment procedural due process, by reason of the Rhode Island Supreme Court's refusal to review the merits of his appeal, becomes crystal clear. The petition for certiorari presents the claim in QUESTION II thereof.

In the event that review in this Court of the Rhode Island Supreme Court's deprivation of the Petitioner's right to administer the Beazley Estate requires the existence of a substantive Fourteenth Amendment "property" right in the grant of administration on the Beazley Estate, of which the

Petitioner claims to be deprived by the refusal of the Rhode Island Supreme Court to review the merits of his appeal, *Malinou v. Kiernan* interprets the Public Administrator Act as granting a public administrator an interest in administering intestate estates which interest extends beyond his term in office. The opinion labels that interest "public policy" (Appx. A, p. 6), expressly rejects the idea that it is a contract right (Appx. A, p. 2) and fails to discuss "property" right. But, it is the Petitioner's contention, since *Malinou v. Kiernan* holds that the right of a public administrator to administer an intestate estate extends beyond his term in office, that the Rhode Island Supreme Court has recognized a "property" right created by the Public Administrator Act, which property vests in the person of the public administrator. Proceeding from the holding that "public policy" extends the right of a public administrator to administer an intestate estate beyond his term in office, the Petitioner points out that "public policy" is a principle of law, and Petitioner calls the Court's attention to the philosopher Bentham who recognized this truth that property is a jural concept existing by virtue of law: "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases." Bentham, *The Theory of Legislation* 111-13 (London ed. 1931). The term "property" within the meaning of the Fourteenth Amendment, therefore, refers to those interests or claims possessed by private parties and recognized and protected by law. Hecht, *From Seisin to Sit-In: Evolving Property Concepts*, 44 B. U. L. Rev. 435, 439 (1964).

CONCLUSION

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, a writ of certiorari issue to the Supreme Court of Rhode Island.

MARTIN MALINOU
334 Smith Street
Providence, Rhode Island
Counsel for Petitioner

DATED: January, 1968

CERTIFICATE OF COUNSEL

I, MARTIN MALINOU, counsel for the Petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58(2) of the Rules of this Court.

Martin Malinou

APPENDIX A

OPINION OF THE RHODE ISLAND SUPREME COURT DELIVERED NOVEMBER 7, 1967 IN NO. 44-APPEAL CAPTIONED MARTIN MALINOU, PUBLIC ADMINISTRATOR VS LEONARD A. KIERNAN, PUBLIC ADMINISTRATOR

ROBERTS, C. J. This is an appeal from a decree of the probate court of the city of Providence granting letters of administration de bonis non for the estate of Carrie Cumber to Leonard A. Kiernan, hereinafter referred to as the appellee. The cause was heard in part in the superior court and thereafter was certified to this court on an agreed statement of facts pursuant to G. L. 1956, 9-24-25, as amended, on January 10, 1967.

It appears that on February 1, 1955, Bernard J. Gallagher was the incumbent public administrator of the city of Providence and in that capacity applied for and was granted letters of administration to administer the estate of Carrie Cumber, deceased. On January 2, 1961, Martin Malinou, hereinafter referred to as the appellant, was elected to succeed Gallagher in the office of public administrator by the city council of the city of Providence. On January 7, 1963, appellee was elected to succeed appellant. On January 4, 1965, the city council elected Francis J. Maguire, hereinafter referred to as the intervenor, to succeed appellee in that office.

The agreed statement of facts discloses that on September 14, 1962, during the term of appellant as public administrator, Gallagher died without having completed the administration of the estate of Carrie Cumber. Thereafter, on November 10, 1964, appellant applied for letters of administration to be appointed to administer the estate of Carrie Cumber, while on December 8, 1964, appellee made a similar application for letters of administration to administer that estate. On December 29, 1964, the probate court granted the peti-

tion of appellee, and letters of administration for the estate of Carrie Cumber issued upon the filing of the required bond on December 31, 1964.

The appellant argues, first, that upon being elected and having qualified for the office of public administrator, he succeeded to the right to administer the estate of Carrie Cumber by operation of law on the death of Gallagher. This contention, as we understand it, posits the view that Gallagher continued as administrator of the Cumber estate after the termination of his incumbency in the office of public administrator. The appellant then argues, as we understand him, that upon Gallagher's death the incumbent public administrator so succeeds to the administration of the Cumber estate by operation of law.

He then digresses and argues that his election to the office of public administrator vested him with a contractual right to act as administrator of and to complete the administration of any estates left unfinished by the prior incumbent in the office. However, he has referred us to no case or to no authoritative text writer holding the view that a contractual right is created, and we reject the argument as being without merit.

The appellant is relying also upon the provisions of P. L. 1876, chap. 567, sec. 11, to establish his claim to succession to the office of administrator of the estate of Carrie Cumber. Section 11 of that act reads as follows:

> "Upon the death, resignation, or other disqualification of a public administrator leaving an estate or estates not fully administered, it shall be the duty of the municipal court, upon application of the city treasurer, to appoint some suitable person to have the charge and care of the personal estate not administered, to hold the same until a successor to such deceased, resigned or disqualified public administrator shall be duly appointed, to whom the municipal court shall grant letters of administration *de bonis non* upon his giving the required bond."

We cannot agree that this statute provides for an automatic succession to the administration of uncompleted estates upon the death of the prior public administrator. From our examination of the statute, it was intended to provide that upon the death of a public administrator whose death left incomplete the administration of estates for which he had been issued letters of administration by the probate court, the city treasurer would be authorized to cause some suitable person to be appointed by the probate court as a caretaker of such estate until a successor to the deceased public administrator would be duly elected and qualified. The statute then requires the probate court to grant letters of administration de bonis non to such a successor administrator upon his giving bond as set by the probate court with respect to such estate.

We are unable to perceive anything in this statute that discloses a legislative intent to mandate the probate court to issue letters of administration sua sponte to a successor public administrator. Rather, in our opinion, it was the intent of the statute that the public administrator comply with the basic responsibilities of his office and bring to the attention of the probate court his acquisition of the status of public administrator and at the same time to apply to the court for letters of administration de bonis non and petition that a bond be set with respect to the assets of such estate.

The responsibilities of a public administrator to which we refer include that established in sec. 2 of the act, which provides: "Such administrator shall take out letters of administration and faithfully administer * * *." In our opinion, the requirement that he "* * * take out letters of administration * * *" requires him to comply with the pertinent procedures of the probate court and make such application for the issuance of letters of administration as those procedures require. In other words, we are of the opinion that this statute contemplates succession—to the administration of the unfinished estates of the prior incumbent of the office—only when the public administrator acts affirmatively to obtain letters of administration and to conform to the

directions of the probate court with respect to his bond. The appellant here did not so act until after his successor had been elected and purportedly qualified to the office.

However, appellant argues that at the time he made application for letters of administration for the Cumber estate, he was the incumbent public administrator. He contends, in support of this position, that appellee had failed to qualify as his successor and that, therefore, he held over in the office. He bases this contention on the conceded failure of appellee to pay a $10 fee prior to assuming office, which the ordinances of the city of Providence require be collected from certain officers, including the public administrator. He directs our attention, in the first place, to the charter of the city of Providence, P. L. 1940, chap. 832, sec. 40, which in pertinent part reads: "All officers of this city, however elected or appointed, shall hold their respective offices for the term or terms for which they are respectively elected or appointed and until their successors are duly chosen and qualified * * *."

The appellant further directs our attention to the requirement for the payment of a fee of $10 contained in The Revised Ordinances of the City of Providence (1946), chap. 2, sec. 159, which in pertinent part reads: "The following fees are hereby established and fixed to be paid biennially for licenses and commissions issued to the following officers elected by the city council, viz: * * * Public administrator, ten dollars." It is appellant's position that the payment of this fee by the person elected to the office of public administrator is a condition precedent to his qualification for that office. Again he refers to the ordinances of the city of Providence for support of this position and directs our attention to The Revised Ordinances of the City of Providence (1946), chap. 2, sec. 160, which reads: "The city collector is hereby directed to charge and collect the foregoing fees of each officer named in the preceding list. Upon the presentation of the receipt of the city collector showing that such fees have been paid by said officers, the city clerk

shall forthwith issue to such officer named in said receipt the license or commission to which he shall be entitled."

We cannot agree that the ordinance provision makes payment of the $10 fee a condition precedent to qualification for the office of public administrator. It may be an element of qualification, but, in our opinion, presentation of the receipt for such payment is not an essential element of qualification. In the first place, the clear language of the ordinance that the collector "* * * is hereby directed to charge and collect the foregoing fees * * *" imposes upon the collector the obligation to charge and collect the fee.

While the ordinance provides that the city clerk issue the commission "Upon the presentation of the receipt of the city collector * * *" for payment of the fee, we cannot agree that a failure on the part of the clerk to require production of the receipt voids an otherwise valid performance of a purely ministerial act directed by the ordinance. Its primary objective is to qualify public officers to discharge necessary municipal functions and not to collect nominal fees for whatever purpose they may be paid. Consistent with this view, we hold that the issuance of the commission to appellee without production of the receipt for payment of the fee, which payment was not demanded by the collector as directed in the ordinance, is not a sufficient failure of compliance with the ordinance to void the ministerial act so clearly directed therein.

In short, it is our opinion that when appellee received his commission from the city clerk on January 16, 1963, he had qualified for the office of public administrator. Because we take this view, we find no error inhered in the action of the probate court in issuing to appellee letters of administration for the Cumber estate.

The question remains as to whether the intervenor has any right to administer the Cumber estate superior to that of appellee. The intervenor argues that he has such a superior right on the theory that appellee was never the incumbent of the office of public administrator, never having

qualified pursuant to the terms of the ordinance. In our opinion, we have answered this contention in finding that appellee had qualified despite his noncompliance with the ordinance provision requiring payment of the $10 fee.

We are concerned, however, with the consequences of the fact that the intervenor is now the incumbent public administrator and appears to raise the question as to whether one who has been appointed administrator of a particular estate on the basis of his status as public administrator is ousted as administrator of that estate when his incumbency in the office of public administrator terminates.

There is, it is true, some division among the authorities as to whether one who attains the status of administrator of a particular estate by virtue of having been the incumbent public administrator continues as administrator of that estate after he is succeeded in the office of public administrator by a successor. We have noted already, however, that sec. 11 of the public administrator act provides that upon the "* * * death, resignation, or other disqualification of a public administrator leaving an estate or estates not fully administered * * *," the probate court shall issue letters of administration for the administration of such estates to the duly appointed successor administrator. The query is then, in our opinion, whether the phrase "other disqualification" includes within its purview expiration of the term of office of a public administrator so as to confer upon the successor public administrator the right to administer such estates. We think not.

To hold that the termination of the office of public administrator disqualifies one to whom the probate court has issued letters of administration from further administering that estate would be to attribute to the legislature an intent to subvert sound public policy declared in the act, which, in our opinion, is the preservation of the continuity of office in the person who has initiated the administration of such estate. In our opinion, the person to whom the letters of administration have issued by virtue of his status as public

administrator becomes an officer of the probate court that issued the letters and is charged with the faithful administration of the estate. Absent his removal for cause by the probate court issuing the letters, the interests of the estate will best be served by continuing him in that capacity until discharged by the court after the allowance of his account.

We now hold, therefore, that even though an appointee to the administratorship of a particular estate ceases to be public administrator, he does not thereby resign or forfeit the administratorship of the particular estate, but remains the administrator thereof until he is discharged or his letters are revoked for cause. In our opinion, the intervenor, therefore, is not entitled to letters of administration on this estate so long as the appellee remains the administrator of that particular estate. We conclude, therefore, that the letters of administration for the Cumber estate properly issued to the appellee, who, as the administrator thereof, is entitled to administer that estate according to law, and that the appeal of the appellant be denied and dismissed.

The record and the papers in this case are hereby sent back to the superior court with our decision certified thereon for entry of a final judgment in accordance therewith.